In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

Nos. 22, 43

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation, *Appellant*,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and CITY OF LOS ANGELES, a municipal corporation, *Appellees*. — No. 22

SOUTHERN PACIFIC COMPANY, a corporation, *Appellant*,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER and PETER E. MITCHELL, as members of and constituting said Commission, *Appellees*. — No. 43

Appeals from the Supreme Court of California.

BRIEF OF PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, APPELLEE.

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BRIEF OF PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, APPELLEE.

FOREWORD.

Prior to the instant joint brief by appellants, all proceedings in Cases Nos. 22 and 43 have been completely separated owing to physical, economic and other recorded differences which we believe rendered their separation proper.

The foregoing is fully confirmed by appellants' opening foreword on joint brief herein which departure is in direct conflict with their previous argument on brief before the Supreme Court of California contrasting the important differences characterizing the two instant cases (43 R. 248). Appellants, however, with the purported authorization of the Clerk of this Court (Jt. B. p. 2) have filed joint brief assertedly to avoid duplication but obviously for a screening of the numerous deficiencies and inadequacies of appellants' showing and to facilitate the indiscriminate interchange of records in an attempt to gloss over the unfavorable parts of the proceedings in an effort to convince this Court that error has been committed against them. Similarly, is their lack of compunction in utterly abandoning the instant records in favor of outside data and materials nowhere in evidence in the official records. We are philosophical as to such practices but we are duty bound to point out that not only the petitions for review in the Court below against which we registered timely protest as typical (43 R. 158-160) but that the appellants' joint brief herein is an aggravated example of the practices referred to. Confronted with the dearth of railroad evidence in the instant proceedings, appellants have gone off the record and far afield with a belated flood of global research consisting largely of the history of antiquated

versus modern transport, which, we submit, lacks pertinency herein. Nevertheless, for brevity and cooperation and owing to the Court's recent orders advancing both cases on the Summary Docket with consequent shortened period, we have endeavored to conform to, but without approving, such consolidation, and if appellants' briefing tactics whereby through artifice they impute a "plural" for "singular", and vice versa to either record prove misleading as to what the individual records and decisions actually hold, should tincture our efforts at preserving proper separation of the cases, it at least will not be intentional generalizations for the lending of complexity and confusion of the record.

For these reasons, we ask that this Honorable Court read very critically Decisions Nos. 47344 and 47420 (22 R. 115-132 and 43 R. Appx. Ex. C, 19-36) alongside the contentions of appellants and note the one-sided picture appellants *jointly* attempt to paint. Page two of appellants' joint brief, for example, misstates the capacity of Los Angeles as parties in real interest rather than appellee.

OPINIONS BELOW.

The decisions of the California Public Utilities Commission in Cases No. 22 and No. 43 (No. 22 R. 115 and No. 43 App., Ex. C 19) are reported in 51 Cal. P.U.C. 771 to 783 and 788 to 798, respectively. The orders of the California Supreme Court denying petition for writs of review are reported in 40 Adv. Cal. 54-55, and 40 Adv. Cal. 472-473, respectively. Said orders are not accompanied by an opinion.

JURISDICTION.

The California Supreme Court denied writs of review respecting the decisions of the California Public Utilities Commission in Cases No. 22 and No. 43 on December 11, 1952 (No. 22 R. 253), and on March 9, 1953 (No. 43 R. 287), respectively. Petitions for appeal were docketed as of March 20, 1953 and April 23, 1953, respectively.

Statements opposing jurisdiction with motions to dismiss or affirm were filed by the Commission in each case. Similarly, statements and motions were filed by the City of Los Angeles as appellee in No. 22 and by the Cities of Los Angeles and Glendale as "real parties in interest" in No. 43.

By order entered on May 18, 1953, this Court postponed consideration of the question of the jurisdiction of the Court in the cases pending hearing on merits and transferred both cases to the Summary Docket.

Jurisdiction of this Court rests upon 28 U.S.C. 1257(2).

QUESTIONS PRESENTED.

The ultimate question in either case is whether the action of the Public Utilities Commission of the State of California in apportioning the following railroad-highway grade separation costs among the parties is within the bounds of the Federal Constitution.

Appellants attack only that portion of the ensuing orders allocating costs amongst the parties.

Appellee Commission's Decisions Nos. 47344 (No. 22) and 47420 (No. 43) were made the subject of petitions for

writs of review before the California Supreme Court. That Court's action denying review constituted a determination upon the merits and satisfies all requirements of due process under the Federal Constitution.

California Public Utilities Code, Sections 1756-1760 (Cal. Stats. 1951, Ch. 764; formerly Public Utilities Act, Section 67);

Napa Val. Elec. Co. v. Railroad Commission, 251 U.S. 366, 371-373 (1920);

Southern Cal. Edison Co. v. Railroad Commission, 6 Cal. (2d) 737, 747 (1936);

Santa Monica v. Railroad Commission, 179 Cal. 467.

PARTIES AND POSITIONS.

Appellee Commission is a constitutional body with jurisdiction herein as hereinafter shown.

Appellants, by joint brief (p. 4) while purporting to be *interstate* railroads say nothing of the fact of their constituting the two largest *intrastate* carriers of freight, passengers and express throughout the State of California, and too, of the further fact that they are among the largest if not the two largest intrastate motor truck, motor bus, and express operators throughout said State owing to their wholly owned subsidiaries—Pacific Motor Transportation Co.-Pacific Motor Transport (Southern Pacific), and Santa Fe Transportation Company (truck and bus) along with their affiliated Highway and other common carriers.

The City of Los Angeles within which the Santa Fe's Washington Boulevard crossing is situated was a respond-

ent in the Court below, and an appellee in the appeal to this Honorable Court in No. 22. Appellants' joint brief at page 2 has erroneously stated the parties.

The Cities of Glendale and Los Angeles, California, alongside and on whose boundary lines the instant Los Feliz Road (Boulevard) grade crossing is situated, are parties of real interest herein in No. 43.

In No. 22, the Washington Boulevard improvement order, following rehearing, briefing and argument (en banc) provided amongst others:

> "Fifty percent (50%) of the costs of the proposed structure attributable to the presence of the railroad's tracks as defined in the foregoing opinion, excluding the cost attributable to the paving and widening of the street, shall be borne by The Atchison, Topeka and Santa Fe Railway Company, and the remainder of the cost shall be borne by the City of Los Angeles." [50% of $569,355] (51 Cal. P.U.C. 771, 783).

In No. 43, the Los Feliz crossing separation order, in accordance with the third alternative and cheapest plan of mutual agreement and joint introduction by the parties and of final adoption by the Commission in the course of the evidence adduced through formal proceedings, provided, amongst others, that:

> "Of the total cost of the proposed structure, as set out in the foregoing opinion, which is estimated to be $1,493,200, fifty percent (50%) shall be borne by the Southern Pacific Company, twenty-five percent (25%) by the County of Los Angeles, twelve and one-half percent (12½%) by the City of Glendale,

and twelve and one-half percent (12½%) by the City of Los Angeles." (51 Cal. P.U.C. 788, 797).

STATUTES INVOLVED.

Statutes

(California)

Public Utilities Act (Statutes 1915, Chapter 91, as amended) [Note: Now Public Utilities Code, California Statutes 1951, Chapter 764, as amended] (hereinafter quoted, in part).

Constitution

(California)

Article XII, Sections 17, 19 to 23a, inclusive.*

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*The Jurisdiction and the Authority of the Public Utilities Commission.

By Article XII, Sections 17, 19, 20, 21, 22, 23 and 23a of the Constitution of the State of California, the Public Utilities Act (Stats. 1915, Chap. 91; now Public Utilities Code, Stats. 1951, Chap. 764) the Public Utilities Commission is given plenary and exclusive authority over public utilities in this State.

Section 22 of Article XII provides in part as follows:

"No provision of this Constitution shall be so construed as a limitation upon the authority of the Legislature to confer upon the Public Utilities Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Public Utilities Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution."

Section 23 of Article XII provides in part as follows:

"• • • The railroad commission [Note: Now Public Utilities Commission] shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the state of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be

Federal

Fourteenth Amendment, and Commerce Clause, Article I, Section 8, Par. 3, Constitution of the United States;

National Transportation Policy (The Congress), 54 Stat. 899;

Other

House Resolution No. 24, California Legislature (1949);

Assembly Concurrent Resolution No. 88, California Legislature (1951).

STATEMENT.

The authority of this Commission to make grade crossing separations and apportion or allocate the costs there-

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conferred upon it by the legislature, and the right of the legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

This equivalent provision is contained in Section 23a of said Article XII.

The Legislature may confer on the Commission any and all authority it possesses over public utilities and in addition it may confer powers upon the Commission that the Legislature itself could not exercise because of constitutional restriction imposed directly upon the Legislature. The only restraint imposed upon the Legislature in conferring powers upon the Commission pursuant to said Article XII is that afforded by the Federal Constitution.

The foregoing constitutional provisions and the Public Utilities Act and Code have received interpretation at the hands of the California Supreme Court, and the plenary authority conferred thereby has been broadly upheld. *Pacific Tel. & Tel. Co. v. Eshleman*, 166 Cal. 640, 650, 689; *Clemmons v. Railroad Commission*, 173 Cal. 254, 258; *City of San Jose v. Railroad Commission*, 175 Cal. 284, 290; *Miller v. Railroad Commission*, 9 Cal. (2d) 190, 195, 198; *Sale v. Railroad Commission*, 15 Cal. (2d) 612, 617.

for as herein involved stems primarily from Section 1202 of the Public Utilities Code (California Statutes 1951, Chapter 764, as amended), from which we quote:

"1202. The commission has the exclusive power:

"(a) To determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use, and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public or publicly used road or highway by a railroad or street railroad, and of a street by a railroad or vice versa, subject to the provisions of Sections 1121 to 1127, inclusive, of the Streets and Highways Code so far as applicable.

"(b) To alter, relocate, or abolish by physical closing any such crossing heretofore or hereafter established.

"(c) To require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the construction, alteration, relocation, or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the State, county, city, or other political subdivision affected."

It was the position of the cities that the railroads should pay that portion of the cost attributable to the presence of their railroad tracks which, according to the record, would have amounted to about 86% of the total cost in No. 43 (S.P. agreeing to but $5,917).

It was the position of appellant Santa Fe that the costs should be allocated according to "benefits" received by the railroad, and since it disclaimed any benefits, appellant Santa Fe would contribute nothing.

Following rehearing, briefing and oral argument (en banc) the Commission in adherence to the entire records and in the light of particular facts presented during rehearing, did not subscribe to either of the foregoing contentions of said parties, but stated that in apportioning the costs due consideration should be given to the obligations of each party as well as the benefits derived, adding that the authority of this Commission to allocate costs in such matters stem primarily from Section 1202 of the Public Utilities Code (California Statutes 1951, Ch. 764, as amended) from which decisions* we quote in part:

> "The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities Code, supra, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained apportioning the costs in the exercise of its sound discretion. (*Erie Railroad Company v. Board of Public Utility Commissioners*, 1920, 254 U.S. 394; *Chicago, Milwaukee and Saint Paul Railway Company v. Minneapolis*, 1914, 232 U.S. 430; *Missouri Pacific Railway Company v. Omaha*, 1914, 235 U.S. 121; *Lehigh Valley Railroad Company v. Board of Public Utility Com-*

*Specifically set out in Decision No. 47344 and affirmed in Decision No. 47420 elsewhere cited herein.

missioners, 1928, 278 U.S. 24.)" (See *Cincinnati, I. & W. R. Co. v. Connersville* (1910), 218 U.S. 336; *State ex rel. Alton R. Co. v. Public Service Commission*, Mo. (1934), 70 S.W. (2d) 57, 60; *Northern Pacific R. Co. v. Minnesota ex rel. Duluth* (1907), 208 U.S. 583; *Penn.-Reading S. Lines v. Bd. of P.U.C. Comm. etc.* (1951), 81 A. (2d) 28; Affirmed, 82 A. (2d) 774.)

Also *State of Missouri ex rel. Wabash R. Co. v. Public Service Commission* (Mo. 1936), 100 S.W. (2d) 522; *Lehigh and N. R. Co. v. Public Service Commission* (1937), 191 Atl. 380, 382; *Chgo. Jct. R. Co. et al. v. Illinois Commerce Commission*, 42 Ill. 579; *State ex rel. Alton R. Co. v. Public Service Commission*, 334 Mo. 985, 70 S.W. (2d) 52, *Same*, 334 Mo. 95, 70 S.W. (2d) 57.

In so doing the Commission in its instant Decisions Nos. 47420 and 47597, which appellant, Southern Pacific, here assails, wholly affirmed its previous holdings in Decisions Nos. 47344 and 43374 (Santa Fe) hereof wherein it had clearly set forth the law when it stated:

"There is no statutory requirement that this Commission follow any particular theory of allocation of costs. Under the theory advanced by the City of Los Angeles that the railroad should pay the additional costs of construction resulting from the presence of the tracks, the railroad's share would amount to about 86 per cent of the total costs. Under the theory advanced by the railroad that it should pay only according to the benefits it receives, and considering its contention that it receives no benefits, its contribution would be nothing.

"The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities

Code, *supra*, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion."

"While the railroad [Southern Pacific] contended that costs should be assessed according to the so-called 'benefits' theory, we affirmed our holding in Decision No. 47344, dated June 24, 1952, in Application No. 29396, wherein it was held that the authority of this Commission to allocate costs stems primarily from Section 1202 of the Public Utilities Code and is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. Therefore, we are not bound to follow this so-called 'benefits' theory, although it is appropriate to observe that the proposed grade separation will obviously be of benefit to the railroad. * * *" (P.U.C. Decision No. 47420, pages 795-796).

Appellants have asserted that the Commission has adopted the so-called "benefits" theory as a policy for the apportionment of costs, including selected citations therefor, but a careful reading of those cited by them do not support such contention. For instance the *Goshen Junction case*, 38 C.R.C. 380 (1933) involved a *state* highway to be paid in part with *Federal-aid funds* for highway construction, in the course of which the Commission took cognizance of the then existing depression and expressly gave

consideration to "the economic situation, particularly at this time when revenues from practically all sources are materially below what they have been in the immediate past". Said facts are borne out by this Commission's Decision No. 25069 of August 15, *(1932)*, for example, as reported in 37 C.R.C. 784, 786-787, and in which it specifically repudiated the so-called "benefits theory" of apportioning grade separation costs in these words:

> "The matter of direct financial benefits is not the sole test in the determination of the respective portions which the railroad and public should contribute toward the cost of such improvement. In apportioning the cost of constructing these separations between applicant and the railroad company, due consideration should be given to the obligations of each party, as well as to the benefits derived. *It should be recognized that the railroad has a continual obligation to participate in the matter of constructing and maintaining reasonable and adequate crossings over its tracks, both at grade and at separated grades. This obligation is inherent, notwithstanding the fact that the traffic on the railroad may increase or decrease.*" (Emphasis added.)

Other citations of the kind by petitioners appear so widely different, factually speaking, as to neither require nor admit of detailed analysis herein. In this connection, we respectfully submit that the Public Utilities Commission of California may, with perfect legal propriety, take inconsistent action in different cases. The test—and the only test—is: On the record in these cases has the Commission remained within the bounds of the Federal Constitution?

Suffice it to state that the Supreme Court of the United States in the case of *Georgia Public Service Commission v. United States*, 283 U.S. 765, 775, laid down the following rule:

> "* * * It is not our province to inquire into the soundness of the Commission's reasoning, the wisdom of its decisions, or the consistency of its conclusions with those reached in similar cases."

This same rule is supported by the following authorities:

Wilbur v. United States, 281 U.S. 206, 216-217;
Securities and Exchange Commission v. Chenery Corporation, 218 U.S. 80;
Federal Administrative Law by vom Baur, pp. 244 to 246, section 256.

Appellants in limiting their attacks against the instant orders to only that portion allocating costs, thereby automatically waive all other portions of said orders.

It follows, therefore, that in seeking support for that portion actually under attack they are not entitled to draw upon other portions of such facts, findings, conclusions, opinions and orders as not specifically embraced in the limited portions actually attacked herein.

In their dilemma as to alternatives of action, and the consequent quandary as to true status they have made *blanket* charges against several entire decisions *in toto* as being in deprivation of (1) property without due process, (2) equal protection under the law, and (3) unduly burdensome on interstate commerce, when in reality only allocation of costs (often by supplemental order) is in-

volved. Lacking in actionable grounds, of course, finds them likewise lacking in other respects—cases.

In thus contending, appellants rely upon the single unique and completely distinguishable case of *Nashville C. and St. L. R. Co. v. Walters*, 294 U.S. 405, hereinafter referred to as the *Nashville* case, respecting which we submitted a detailed analysis and our conclusions as to its being wholly inapplicable to the instant cases at bar (Ex. No. 2, 43 R. 134, 139 and 22 R. 85-94).

As already indicated, it is of record that this Commission in apportioning the instant costs of construction gave due consideration to the obligations of each party as well as the benefits derived (51 Cal. P.U.C. 771, 778) (22 R. 115, 129).

We have uniformly contended that the *Nashville* case is no authority for the inference by appellants that the law has now been changed so that railroads cannot be required to pay the costs of grade separations.

As was stated by this Honorable Court in the *Nashville* case (p. 431) (22 R. 88):

> "* * * No case involving like conditions has been found in any of the lower Federal courts; nor, excepting the case here under review, has any such been found among the decisions of the highest courts of any State."

This, we think, makes it abundantly clear that the Supreme Court of the United States did not intend that the *Nashville* case should be considered as reversing the long line of prior decisions setting forth the railroads' re-

sponsibility in connection with grade separations. From a detailed analysis of the *Nashville* case (22 R. 85 and 43 R. 134) we have shown it to be wholly inapplicable to the instant cases at bar, hence shall not repeat the record at this time.

STATEMENT*—SUMMARY—ARGUMENT.

1. "R.R." Benefits.

In thus collectively summarizing it is respectfully submitted that appellants are highly inconsistent in their clamor for net "benefits" to rail operations, meaning a net profit to rail operations, and simultaneously disclaiming numerous other important and substantial benefits and advantages to both themselves and their wholly owned highway subsidiaries.

Appellants seem to forget that they received tremendous benefits when the State of California permitted them to exercise the high privilege of operating within its borders. It must be kept ever in mind that a public utility *performs a function of the State (Smyth v. Ames,* 169 U.S. 466, 544) and *exercises an extraordinary privilege* and *occupies a privileged position (United Fuel Gas Co. v. Railroad Commission,* 278 U.S. 300, 309). Each day that appellants exercise this extraordinary privilege granted to them by governmental authority they receive extraordinary benefits

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*In lieu of detailed abstracts of the transcript of the records please refer to the following:

1. Washington Boulevard, Decision No. 47344 (51 Cal. P.U.C. 771-783) (No. 22 R. 115-132) and
2. Los Feliz, Boulevard, Decision No. 47420 (51 Cal. P.U.C. 788-798) (No. 43 R. Appendix, Exhibit C, pages 19 to 36).

by requiring appellants to pay the entire cost (if the State sees fit to require it) incident to the establishment of a grade crossing or grade separation is only one of the just burdens incumbent upon appellants to bear in consideration of the extraordinary privilege which appellants have received from governmental authority and which they daily enjoy. Therefore, when appellants clamor for benefits, the ready answer and reply is: "You have already received your benefits." And above and beyond this, *we must not forget that costs which a railroad bears in connection with grade crossings and grade separations are passed on to the rate payers of the railroad in the form of rates.*

That leading cases prior to, during and since the so-called *Nashville* case support the controlling principles of law whereby a railroad company takes its charter subject to the power of the State to provide for the safety of the public, and tracks of the railroad are laid subject to the condition necessarily implied that their use can be so regulated by competent authority as to insure said public safety, welfare, convenience and necessity needs no comment herein. Also, that such railroad, when thus accepting privileges and franchise granted in its charter must be deemed to have taken into account expenses which might thereafter be incurred by reason of an order of the Public Utilities Commission compelling the necessary installation for its safe operation at public highways likewise needs no further confirmation. (*Penna.-Reading Seashore Lines v. Board of Public Utility Commissioners, Department of Public Utilities, et al.* (1951), 81 A. (2d) 28, 33; affirmed in 82 A. (2d) 744.

2. Interstate Commerce.

The decisions of the Commission do not constitute an unlawful or other burden on interstate commerce. The fact that appellants constitute the two largest rail-truck-bus-express operators throughout California and also engage in interstate operations does not alter the situation.

Appellants' claims that the instant orders unduly burden interstate commerce are equally remote and unfounded when it is considered that throughout the entire proceedings herein no showing has been made herein that the Commission orders will in anywise result in impairment of appellants' ability to render the services required under the law or that the Commission's orders in anywise impinge on the national transportation policy.

Furthermore, it is assumed that the Honorable Court will take judicial notice of appellants' greatly enhanced financial status wherein their net earnings have attained maximum peaks during and since the instant proceedings. The mere fact that appellants are engaged in interstate as well as intrastate commerce has no significance so far as the validity of the instant orders are concerned. Appellants do not categorically assert that a state has no authority to burden or regulate interstate commerce, but it might be inferred that such contentions are being made by appellants from the propositions advanced by them.

We desire to direct attention to the rule laid down by this Honorable Court that a State may lawfully burden interstate commerce and regulate it so long as state authority does not discriminate against such commerce. *(So. Carolina State H. Dept. v. Barnwell Bros.*, 303 U.S. 177,

189; *Panhandle Eastern Pipeline Co. v. Michigan Public Service Commission*, 341 U.S. 329, 333; *Railway Express Agency v. New York*, 336 U.S. 106, 111; *Kelly v. Washington*, 302 U.S. 1, 9-15; *Cities Service Gas Co. v. Peerless O. & G. Co.*, 340 U.S. 179, 186), and it has long been held by the United States Supreme Court that until such time as the Congress preempts the entire field of regulation, both interstate and intrastate common carriers and utilities are subject to State regulation in so far as intrastate operations and services are concerned even though their operations are regulated by federal authority (*Cooley v. Board of Port Wardens* (1851) 12 Howard (U.S.) 299; *Minnesota Rate Cases* (1914) 230 U.S. 352; *Eicholz v. Public Service Commission* (1939) 306 U.S. 268; *Smith v. Illinois Bell Telephone Co.* (1930) 282 U.S. 133; *Lindheimer v. Illinois Bell Telephone Co.* (1934) 292 U.S. 151). No confiscation has been shown and none can be shown by either of the appellants, the enhanced financial conditions of which exceed all others of Western Territory.

3. Pedestrian Traffic Hazards and Passenger-Carrying Vehicular Traffic.

One of the highly important topics for priority consideration in these cases, and the one that has been most studiously avoided by each of the appellants is the matter of the safety, welfare and convenience of the comparatively large number of pedestrians using the Los Feliz and Washington Boulevard crossings. In the former the record supports through official Exhibit No. 2 (R. 43) the fact that on an average over 600 pedestrians use the Los Feliz intersection daily, most of whom cross the several main line and other tracks of said appellants.

In both proceedings, the Commission, in specifically finding for the "public safety, convenience and necessity" responsive to public demands for relief and pursuant to California Legislature Resolutions directing it to proceed, continually recognized the pedestrian and passenger-carrying vehicular aspects of the instant situations emphasizing the local transportation needs and the Cities' contribution thereto must come entirely from local funds, since neither is a State Highway nor Federal-aid project (51 Cal. P.U.C. 780-782, 788-798). Likewise, it is shown that in the 20′ underpasses embraced within the Washington Boulevard improvement that no provision whatsoever exists for the hundreds of pedestrians daily using that crossing. The point is therefore how, in view of the facts as established by day by day actual counts of the pedestrian traffic at these two crossings, can the respective appellants decry the subject of safety, convenience and necessity against and harp entirely upon the matter of trucks, which latter vehicles, according to the record, include many local and light delivery trucks and constitute less than 25% of the total vehicles using said crossings. It is common knowledge that private passenger cars using these crossings carry one or more passengers in addition to the drivers of such vehicles, and it is similarly established that even the motor trucks carry as a minimum one driver or more personnel. As regards the safety, welfare and convenience of all of these, the appellants are silent, urging instead that the only dangers obtaining at these crossings are those of competitive trucks operating in opposition to said appellants' railroads. (Apparently little mention and no criticism of the numerous railroad owned trucks and buses involved.)

San Francisco, California
October 8, 1953

TO ALL PARTIES OF RECORD:

Re: Cases Nos. 22 and 43 in the Supreme Court of the United States, October Term 1953

E R R A T A

Please refer to Appellee Commission's joint brief in the above cases, and correct the following typographical errors and omission, to-wit:

Page 5 (ninth line from bottom)

"is" should read "if"

Page 21 (following third to last line) add:

"order of the Public Service Commission authorizing the widening of a concrete viaduct over a railroad, said: 'The state has the right to build its other public highways, for travel by other means, over, across, or under the railroad. To accommodate such travel, it has the right to build new roads across railroads at new places and provide for the necessary kind of crossing, or to widen existing roads and alter such crossings already established, as the public interest may in either case reasonably require. If it did not, it would no longer be the sovereign.' and,"

Page 24 (tenth line from top)

"can" should read "cannot"

PUBLIC UTILITIES COMMISSION
OF CALIFORNIA, Appellee.

(Please insert at page 21 of brief.)

4. Police Power.

It is respectfully submitted that appellee Commission regularly pursued its authority in the instant proceedings.

Certainly, appellants cannot validly contend that they have not been accorded procedural process to the utmost and given every opportunity to present their cases. These are sufficient under the laws and the Constitutions.

As state by Mr. Chief Justice Taft in *Lehigh Valley Railroad Co. v. Board of Public Utility Commissioners*, 278 U.S. 34, 35:

> *"The care of grade crossings is peculiarly within the police power of the states."* (Citing cases.) (Emphasis added.)

Also, so zealously have the Courts guarded the police power of the States and their political subdivisions with respect to railway crossings of highways, they have held in numerous cases where municipalities have by contract agreed with railway companies to pay the expenses of maintenance and repair of grade separation structures after their construction, that such contracts are void as against public policy, since they constitute the virtual abdication of sovereign powers, it being said in such cases that the "police power cannot be contracted away" (*Northern Pacific Railroad Co. v. Minnesota ex rel. Duluth*, 208 U.S. 583, 596; *Chicago, M. & St. P. R. Co. v. Minneapolis*, 232 U.S. 430, 441). Also, as stated in *State ex rel. Alton R. Co. v. Public Service Commission* (Mo. 1934), 70 S.W. (2d) 57, 60, the Supreme Court of Missouri in upholding an that as stated by Mr. Justice Holmes in the *Erie* case heretofore cited:

> "That the states might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights." (254 U.S. 410),

and that as to the inherent continuing obligation aspects herein the Supreme Court has said:

> "There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one, that it cannot be contracted away, and that a requirement that a company or individual comply with police regulations without compensation is the legitimate exercise of the power, and not in violation of the constitutional inhibition against impairment of the obligation of contracts."

5. Confiscation.

That in reply to appellants' allegation of taking property without payment, in affirming judgment in *Chgo. M. & St. P. R. Co. v. Mpls.*, 232 U.S. 430, 437, where this question was presented, the Court concluded:

> "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways.",

and as was similarly held in *Missouri Pacific R. Co. v. Omaha*, 235 U.S. 121, 127, that in discussing the rule respecting decisions pursuant to the police power and supporting facts therefor, this Supreme Court has held that if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence

of that state of facts, and one who assails classification must carry the burden of proof that the action is arbitrary. *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185-186, citing *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 209.

6. P.U.C. Procedures.

In the *Nashville* case on which appellants rest their combined efforts of attack for the nullification of the police power of the State, in order to advance their own rail "benefits" pleas, this Honorable Court at page 433 said:

> "* * * When the scope of the police power is in question the special knowledge of local conditions possessed by the State tribunals may be of great weight. (Citing cases) * * *"

and expressly recognized the following principle of law (quoting the Court):

> "It is also true that state action imposing upon a railroad the cost of eliminating a dangerous grade crossing of an existing street may be valid although it appears that the improvement benefits commercial highway users who made no contribution toward its cost." (Citing cases.) (294 U.S. 405, 430.)

The Supreme Court of the United States has held in an unbroken line of decisions that Courts must not substitute their judgment for that of regulatory bodies (*St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38; *Railroad Commission of Texas, et al. v. Rowan and Nichols Oil Co.*, 310 U.S. 573, 581-582), pointing out that a Court must not substitute its judgment for that of the regulatory body even though the evidence is convincing that the judgment

of the Court is better than the result arrived at by the regulatory body (*Railroad Commission of Texas v. Rowan and Nichols Oil Co.*, 311 U.S. 570; *National Labor Relations Board v. Link-Belt Co.*, 311 U.S. 584, 596, 597. This rule is not altered or varied even though the facts are not in dispute. Such a state of record makes no difference (*Gray v. Powell*, 314 U.S. 402, 412).

Mr. Justice Holmes, speaking for the Court, stated the rule very succinctly as follows:

> "It is enough if we can say that it was *impossible* for a fair-minded board to come to the result which was reached." (*San Diego Land and Town Co. v. Jasper*, 189 U.S. 439, 441-442.) (Emphasis added.)

Procedurally speaking, the instant situation as urged by appellants is well characterized by this Court in the case of *American Toll Bridge Co. v. Railroad Commission*, 12 C. (2d) 184, 207:

> "• • • Nothing appears which justifies a conclusion that all the essentials of a full and fair hearing before the Railroad Commission [Public Utilities Commission] were not accorded the petitioner in compliance with requirements of the constitutional mandate."
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> • • • • • • •
>
> "• • • We conclude that the procedure followed in the present matter has not infringed upon the rights of the petitioner vouchsafed to it by the State and Federal Constitutions."

And in *Southern California Edison Co. v. Railroad Commission*, 6 Cal. (2d) 734, 748, the Court, in denying such a review as here sought by appellants, commented as follows:

> "There is another field of extensive scope in which the respondent commission exercises its powers and wherein the action of the commission is brought into question before this Court. In this field are the executive and administrative orders of the Commission in connection with which the Commission exercises a wide discretionary power, such as in the granting, withholding and cancelling of permits and countless other orders of regulation and control. Within this classification, it quite often happens that the complaining party seeks redress in this Court on alleged federal constitutional grounds, when in fact there is no such question substantially involved. In such cases, it may not be successfully contended that this Court, on a review proceeding involving the action of the Commission, should be a trier of disputed questions of fact, already resolved by the Commission."

All told, it seems perfectly clear, therefore, that the motivating purpose is and the obvious results are Southern Pacific's, and Santa Fe's attacks herein would be the ultimate defeat through prolonged and futile negotiations of any and all State grade separation relief owing to the highly controversial character of the impracticable benefits theory (meaning a net monetary railroad operating profit or we won't pay) which they here seek to obtain, and just as we have said heretofore and as we here reiterate, that mindful of the history of Commission grade crossing procedures it is doubly apparent that appellants' rail benefits theory here urged would be a perversion of grade crossing regulation as it exists in California, and would virtually nullify the present constitutional and statutory mandates of this State.

Additionally, the instant situation as stated by the Honorable Supreme Court of the United States speaking through Mr. Chief Justice Vinson:

> "* * * It is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved." *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341 347 (citing cases), *New York v. United States*, 284 U.S. 284, 334-336.

Contrariwise, however, appellants lacking semblance to a case come screaming to this Court to change the law.

Of course, if the law is to be changed as appellants have sought and here seek, then we do not know if there is very much of anything that we can do about it.

CONCLUSION.

It is respectfully submitted that the within appeal should be dismissed and certiorari denied or that the judgments and decrees of the Supreme Court of the State of California denying petitions for writs of review and the decisions and orders of the Commission be affirmed.

Dated, San Francisco, California,
October 5, 1953.

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